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No. 90-1697 (2)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

JOSEPH F. CADA,

Petitioner,

v.

BAXTER HEALTHCARE CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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20

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals properly affirmed the district court's entry of summary judgment.

2. Whether the Court of Appeals correctly determined that the limitations period began to run when the adverse employment decision was made and communicated to Cada.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED FOR REVIEW ..	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE	1
STATEMENT OF FACTS RELEVANT ON REVIEW	3
REASONS THE WRIT SHOULD NOT BE GRANTED	6
ARGUMENT	7
I. THE COURT SHOULD NOT GRANT CERTIORARI	7
A. The Court Of Appeals Properly Affirmed The District Court's Entry Of Summary Judgment, In Accordance With The Rules Governing Summary Judgment	7
B. The Court Of Appeals Correctly Determined That The Limitations Period Began To Run When The Adverse Employment Decision Was Made And Communicated To Cada On May 5, 1987	10
CONCLUSION	15

TABLE OF AUTHORITIES

CASES	PAGE
Abramson v. University of Hawaii, 594 F.2d 202 (C.A. 9, 1979)	11
Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986)	8, 9
Barnes v. Hillhaven Rehab. & Convalescent Center, 686 F. Supp. 311 (N.D. Ga. 1988)	12
Celotex Corp. v. Catrett, 477 U.S. 317 (1986)	8
Delaware State College v. Ricks, 449 U.S. 250 (1980)	11, 13
Graver Mfg. Co. v. Linde Co., 336 U.S. 271 (1949)	15
Hammock v. American Pad & Paper Co., 41 Fair Empl. Prac. Cas. (BNA) 1598 (E.D. Wis. 1986)	12
Heiar v. Crawford County, Wis., 746 F.2d 1190 (C.A. 7, 1984), *cert. denied*, 472 U.S. 1027 (1985)	11
Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986)	8, 9
Mobil Oil Corp. v. FPC, 417 U.S. 283 (1974)	10
Mull v. ARCO Durethene Plastics, Inc., 784 F.2d 284 (C.A. 7, 1986)	12
Palucki v. Sears, Roebuck & Co., 879 F.2d 1568 (C.A. 7, 1989)	9
Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951)	10

RULES

Fed. R. Civ. P. 56 ..... 8, 14

STATUTES

Age Discrimination in Employment Act, 29 U.S.C. Sec. 621 *et seq.* 2

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Baxter Healthcare Corporation, respectfully urges that the Petition for Writ of Certiorari filed by Petitioner, Joseph Cada, be denied.

STATEMENT OF THE CASE

On December 12, 1988, Petitioner Joseph F. Cada ("Cada") filed a Complaint in the United States District Court for the Northern District of Illinois alleging that Respondent Baxter Healthcare Corporation ("Baxter")[1]

[1] Pursuant to Supreme Court Rule 29, Baxter respectfully submits that it has no parent companies or subsidiaries which have an interest in the outcome of this appeal.

had engaged in unlawful and discriminatory employment practices and actions, and that Baxter had willfully or unwillfully discriminated against Cada on account of his age, in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. Sec. 621 *et seq.*

After conducting substantial discovery with respect to the allegations contained within Cada's complaint, Baxter moved for summary judgment on the grounds that: (1) Cada's Complaint was time-barred due to Cada's failure to file a Charge with the Equal Employment Opportunity Commission ("EEOC") within 300 days from the date that he was notified of his termination; and (2) even assuming *arguendo* that Cada's Complaint were not time-barred, Cada had failed to raise a genuine issue of material fact as to his age discrimination claim.

On March 20, 1990, district court Judge Harry D. Leinenweber granted Baxter's motion for summary judgment (Cada Petition App. A17-A30). Judge Leinenweber reasoned that the 300 day limitations period in which Cada could have filed a Charge of age discrimination with the EEOC began to run on May 5, 1987, when Cada received notice of his termination (*Id.* at A20-A21). Judge Leinenweber rejected Cada's assertion that he received notice of his termination on May 22, 1987, and likewise rejected Cada's equitable tolling arguments and contemplated effort to include a failure-to-hire claim (*Id.* at A25-A29). Accordingly, Judge Leinenweber ruled that Cada's Charge of age discrimination was not filed within 300 days of Baxter's allegedly discriminatory act and granted Baxter's motion for summary judgment (*Id.* at A29).

Cada appealed the district court's grant of summary judgment to the United States Court of Appeals for the Seventh Circuit. A three-member panel of that Court, consisting of Judges Wood, Easterbrook and Posner, received

the briefs of the parties and heard oral argument. On December 13, 1990, the Seventh Circuit panel issued a unanimous decision (*see* Cada Petition App. A5-A16). In its opinion, which was written by Judge Posner, the Seventh Circuit affirmed the district court's order and awarded Baxter its costs incurred in defending Cada's appeal. More specifically, Judge Posner stressed that Baxter had presented "compelling, as well as uncontested, evidence, which no rational jury would be entitled to discount, that he [Cada] knew he had been fired" on May 5, 1987 (Cada Petition App. A15-A16). In affirming that Cada had failed to timely file his charge with the EEOC, Posner also emphasized that "*Ricks* establishes that it is the date of firing or other adverse personnel action, not the date on which the action takes effect and the plaintiff is terminated, that—provided it is communicated to the employee, and it was here—is the date of accrual" (*Id.*).

On December 27, 1990, Cada filed a Petition for Rehearing with the Seventh Circuit, which was denied on January 17, 1991 (*Id.* at A1-A2). Cada subsequently submitted the pending Petition for Writ of Certiorari to the Supreme Court of the United States on May 6, 1991.

STATEMENT OF FACTS RELEVANT ON REVIEW

Cada has set forth in his petition for review a statement of "facts" which is neither accurate nor substantiated by *any* citation to the record which was before the Court of Appeals. Accordingly, Baxter refers this Court to the following undisputed facts:

- Throughout his employment with Baxter's V. Mueller Division, Cada was responsible primarily for the production of the armamentarium, *i.e.*, the catalog in which

that Division describes its drug products (Cada Petition App. A6; *see also* R.36-1: Cada Dep. 56, 59-60).

- In early 1987, Jim Becks, who was a Director of Sales and Marketing with the Company, became Cada's supervisor with respect to production of the catalog. Becks requested that Cada provide him with a report regarding the catalog's timetable, costs and vendor management. Becks soon discovered that considerable problems existed in all of these areas, and he relayed his dissatisfaction to Cada (Cada Petition App. A6; *see also* 7th Cir. App. 116, 119; R.36-2: Cada Dep. 218, 220).

- In April 1987, Becks was promoted to Vice-President of Business Planning and Development, and he retained supervisory authority over the catalog project. Because the project was chronically behind schedule and over budget, Becks asked Cada for a comprehensive report on the status of the Creative Services department (Cada Petition App. A6; *see also* 7th Cir. App. 120-24, 127; R.36.4: Cada Dep. 372-74).

- After receiving this report, Becks discussed the project with the Company's president and several vice-presidents during a series of meetings during late April of 1987. The general consensus was that Cada was falling short in meeting his responsibility for managing the catalog project. They eventually decided that the department should be reorganized to emphasize more aggressive and strategically-oriented tactics for marketing Baxter products, and that Cada was not the person to head the newly created department (Cada Petition App. A6; *see also* R.37-1: Bolton Dep. 57-58, 61, 66, 71; R.40-2: Becks Dep. 252-53, 259, 235-38).

- After the decision had been made to terminate Cada and to establish a new direction for the Creative Services department, Becks arranged an 8:00 a.m. appointment with Cada for May 5, 1987. Becks met with Cada on May 5, and advised Cada that his department was being reorganized, that Cada was not going to be part of the new direction, and that his position was being eliminated. Becks told Cada that he would be terminated about two weeks after a manager for the new Marketing Communications department were hired, which would probably be in early July (Cada Petition App. A6; *see also* 7th Cir. App. 89, 164, 167-69; R.37-1: Bolton Dep. 70-72).

- During his deposition, Cada specifically recalled his May 5 conversation with Becks as follows:

  Q. [By Mr. Connell] And then what did [Becks] say to you [on May 5, 1987]?

  A. [By Mr. Cada] *Mr. Becks said the decision had been made, and that they were searching for my replacement*, who would probably be in the organization around the end of June, early July; *and that I could expect to be terminated about two weeks after that*, because they wanted me to stay on for awhile to orient the new person.

  He said that I would receive payment until the end of the year. That I would receive a generous retirement package, and that I should not discuss this with my personnel when I got—when I got back to the office until he had the opportunity to discuss my retirement with them, and to talk to them about the reorganization of the department.

  (7th Cir. App. 88-89, emphasis added).

- Immediately after meeting with Becks on May 5, Cada went to Baxter's human resources department and obtained a packet of outplacement and benefit forms, which he completed only a few days later (Cada Petition App. A6; *see also* 7th Cir. App. 92, 95, 104-05, 155).
- On May 5, 1987, Cada also met with an outplacement consultant, and he continued to attend outplacement counseling sessions throughout the remainder of his employment with Baxter. Cada's last day of work was July 31, 1987 (Cada Petition App. A6; *see also* 7th Cir. App. 133, 153, 175-76).
- On March 4, 1988, more than three hundred (300) days after receiving notice of his termination on May 5, 1987, Cada filed a complaint of age discrimination with the EEOC by submitting an unauthorized Charge and completing an EEOC interview (Cada Petition App. A7; *see also* 7th Cir. App. 110).

REASONS THE WRIT SHOULD NOT BE GRANTED

The decision sought to be reviewed here is consistent with the decisions of this Court, as well as the United States Court of Appeals, regarding the standards for summary judgment and the beginning of the 300 day limitations period under the ADEA. Review by this Court could only result in unsettling what has previously been settled.

ARGUMENT

I. THE COURT SHOULD NOT GRANT CERTIORARI

A. The Court Of Appeals Properly Affirmed The District Court's Entry Of Summary Judgment, In Accordance With The Rules Governing Summary Judgment

For the most part, Cada's Petition for Writ of Certiorari consists of nothing more than a diatribe against the granting of summary judgment by district courts in any and all claims under the ADEA, including his. Cada apparently argues that summary judgment was inappropriate in this case because the district courts in general are improperly relying upon Rule 56 in order "to clear their calendars." Through even more convoluted logic, Cada recklessly claims that Judge Posner's "intellectual bias" influenced the outcome of this case at the appellate level. Clearly, as addressed below, these arguments do not meet this Court's standards for granting a writ of certiorari.

With respect to Cada's claims that the district court misapplied the Rule 56 standard, and that the Court of Appeals was unduly influenced by Judge Posner's "intellectual bias," Baxter notes that any reference whatsoever to the findings set forth in the well-reasoned and detailed opinions of the district court and the Seventh Circuit is notably absent from Cada's petition. Rather than address the specific findings made and the standard actually adopted by the lower courts, Cada has instead set forth the outcome which he believes the summary judgment standard should have delivered in his case, and has made vague assertions that the standard has been misapplied.

To support his broad-based argument that courts have diverged from the appropriate Rule 56 summary judgment standard, Cada relies upon authority which he has quoted directly from the head notes of an annotated version of

the Federal Rules of Civil Procedure (*see* Cada Petition 30-35). Thus, in his Petition to this Court, Cada has attempted to conceal that the standard which was applied by both the district court and the Seventh Circuit in this matter is precisely the standard which has been clearly and carefully annunciated by this Court over the last five years. In contrast, all of the cases cited in Cada's petition are cases which addressed the summary judgment standard as it was interpreted and applied *before* the Supreme Court "trilogy" of cases, which articulated the appropriate summary judgment standard for courts to apply in determining whether a plaintiff has raised a "genuine issue as to any material fact" under Federal Rule of Civil Procedure 56. *See, e.g., Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). In these cases, the Court emphasized that the party opposing summary judgment may not simply rest on its pleadings, but must provide sufficient evidence such that a reasonable trier of fact could return a verdict for the non-moving party. *Anderson*, 477 U.S. at 247. In fact, the Court explained in *Anderson*:

> If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted.
>
> * * *
>
> [T]he judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other, but whether a fair minded jury could return a verdict for the plaintiff on the evidence presented. The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict—whether there is [evidence] upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof is imposed.

Id. at 251 (emphasis in original; citations omitted); *see also Matsushita*, 475 U.S. at 586 (emphasizing that the party must do more than simply "show that there is some metaphysical doubt as to the material facts," and recognizing the propriety of summary judgment "where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party").

The rest of Cada's argument similarly suffers from his failure to recognize this Court's carefully expressed standard for summary judgment. He bases his claims that Baxter argued for a "variant rule" for summary judgment and that Judge Posner is guilty of "intellectual bias" on *Palucki v. Sears, Roebuck & Co.*, 879 F.2d 1568 (C.A. 7, 1989). In *Palucki*, however, the court adopted and applied the standard set forth by this Court in *Celotex*, *Anderson* and *Matsushita*. As Judge Posner stated in *Palucki*:

> The district court must still make a judgment as to whether the evidence, interpreted favorably to the plaintiff, could persuade a reasonable jury that the employer had discriminated against the plaintiff. Cf. *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). If not, the court must grant the employer's motion for summary judgment.

Id. at 1570. This consistency among the pronouncements of the Supreme Court and Judge Posner confirm that the goal that Cada claims to pursue—*i.e.* that "the same rules applicable to other cases apply in Age Discrimination in Employment cases"—is already being met, and was met in this case. This consistency also reflects the regrettable ease with which Cada would apparently attempt to tar a noted jurist with claims of "intellectual bias."

Finally, Cada's own argument disputes his claim that federal courts are abusing the summary judgment procedure and misapplying the Rule 56 standard in order to "clear their calendars" (*see* Cada Petition 36). In support of his argument, Cada cites a multitude of cases in which a district court's grant of summary judgment has subsequently been *reversed* by Courts of Appeals, including the Seventh Circuit, upon review (*see id.* at 36-40). Taken to its logical extreme, however, Cada's argument actually *confirms* the legitimacy of the Seventh Circuit's affirmation of the district court's order, as the Seventh Circuit—which Cada has thus apparently credited with carefully scrutinizing lower court orders granting summary judgment motions—found after careful consideration in this case that his claim fell within the ambit of cases which Rule 56 was designed to resolve without further litigation. Because Cada's criticism of the application of Rule 56 to the present case is wholly unsupported, his petition for writ of certiorari should be denied. *See, e.g., Mobil Oil Corp. v. FPC*, 417 U.S. 283, 310 (1974) ("[t]his court will intervene only in what ought to be the rare instance where the standard appears to have been misapprehended or grossly misapplied"); *see also Universal Camera Corp. v. NLRB*, 340 U.S. 474, 491 (1951).

B. The Court Of Appeals Correctly Determined That The Limitations Period Began To Run When The Adverse Employment Decision Was Made And Communicated To Cada On May 5, 1987

Both the lower court and the Seventh Circuit reviewed the extensive evidence presented in this case and found that Cada was notified of his termination on May 5, 1987. Accordingly, both courts determined that, because Cada did not file his Charge of discrimination within 300 days of May 5, 1987, Cada's claim of age discrimination was

time-barred and Baxter's motion for summary judgment was warranted.

In his Petition for Writ of Certiorari, Cada asserts that the appropriate standard for determining when the limitations period begins to run is when the aggrieved employee receives clear and unequivocal notice of an adverse employment decision, from a proper authority which could not be misapprehended by the employee (*see* Cada Petition 1-2, 24, 41-43, 45-46). Cada then argues that, in the present case, although Cada "received some sort of notice from Becks on May 5, 1987," this notice was insufficient to begin the limitations period (*see id.* at 45).

Cada's analysis is fatally flawed in several respects. To begin, Cada overlooks the fact that this Court long ago clarified that the time period for filing a charge with the EEOC begins to run at the time an aggrieved party is notified of the alleged discriminatory act. *Delaware State College v. Ricks*, 449 U.S. 250 (1980). The *Ricks* decision further clarified that a filing period begins to run when a decision is made and communicated to the employee and, by focusing only upon the notice given and not which authority gave the notice, recognized that "the proper focus is upon the time of the *discriminatory acts*, not upon the time at which the *consequences* become most painful." *Id.* at 258 (emphasis in original) (quoting *Abramson v. University of Hawaii*, 594 F.2d 202, 209 (C.A. 9, 1979)).

Furthermore, the Seventh Circuit has repeatedly adopted this rule. *See, e.g., Heiar v. Crawford County, Wis.*, 746 F.2d 1190, 1194 (C.A. 7, 1984), *cert. denied*, 472 U.S. 1027 (1985). The courts have confirmed that when an aggrieved party receives notice of a final employment decision, the time period begins to run at the time of notice rather than from the time of that party's actual termination of employ-

ment. *See, e.g., Mull v. ARCO Durethene Plastics, Inc.*, 784 F.2d 284, 288 (C.A. 7, 1986). Thus, despite Cada's arguments to the contrary, it is clear that summary judgment is appropriate on the issue of timeliness in those cases where an employer has given the complaining employee notice of termination. *See id.* at 288-89 (plaintiff's deposition testimony failed to raise genuine issue; no factual dispute existed under Rule 56(c) where plaintiff relied on the bare assertion that an issue as to the time of his notification existed).

Consistently, the fact that Cada claims he did not "subjectively believe" he had been notified of an adverse employment decision is not enough to create a genuine issue of material fact regarding the timeliness of his subsequent filing of a charge. Indeed, courts have explicitly recognized the irrelevance of such subjective belief on the part of a plaintiff. *See, e.g., Hammock v. American Pad & Paper Co.*, 41 Fair Empl. Prac. Cas. (BNA) 1598 (E.D. Wis. 1986) (granting summary judgment on timeliness grounds based upon employee's receipt of oral suggestion that he "look for another job," even though plaintiff submitted an affidavit that "it was unclear to [him] whether this was a suggestion or if in fact [he] was being terminated and employee handbook required written notice of termination); *Barnes v. Hillhaven Rehab. & Convalescent Center*, 686 F. Supp. 311 (N.D. Ga. 1988) (holding that period for filing EEOC charge was triggered when employee was clearly informed that she would have to resign or be discharged, despite plaintiff's claim that the time period had not yet begun because she had attempted to dissuade the decision-makers, where no indication was given to her that the decision was anything other than final).

In the present case, the Seventh Circuit applied the well-established standards which are set forth above, and

confirmed that "*Ricks* establishes that it is the date of firing or other adverse personnel action, not the date on which the action takes effect and the plaintiff is terminated, that—provided it is communicated to the employee, and it was here—is the date of accrual." (Cada Petition App. A16). That court considered *Ricks* in depth, as well as the risk that allowing casual exceptions to the *Ricks* standard would make deadlines illusory. The Court of Appeals then addressed and explicitly rejected Cada's claim that because Becks was not his immediate supervisor on May 5, he was not aware that he had been given notice of his termination on that date. The Seventh Circuit noted, for example, that, in full compliance with the *Ricks* standard, Cada was notified of the termination decision on May 5. In his detailed opinion, Judge Posner specifically found that:

> Baxter submitted to the district court a mass of testimonial material all to the effect that, before May 5, the president of the division of Baxter in which Cada worked had authorized Becks to reorganize the creative services department and in the process to jettison Cada. *This evidence, which was not contradicted, showed that Becks was authorized to fire Cada and that he did so at the May 5 meeting.* By Cada's own version of the meeting of May 22 with Stauner, Stauner merely made clear at that meeting that Becks had been acting within his actual authority when he fired Cada. The May 5 meeting was the equivalent of the tenure vote in *Ricks*. It was the making and communication to Cada of the decision to fire him effective within a few weeks after Cada's replacement came on board.

(Cada Petition App. A8) (emphasis added).

In addition to the facts set forth above, the Seventh Circuit reasonably found further confirmation of the unequivocal nature of the notice which Cada received on

May 5. That same day, for example, Cada went to the Company's human resources department and obtained a packet of outplacement and benefit forms, which he completed a few days later (*see id.* at A6). Even if Cada's subjective beliefs were relevant to the limitations issue at hand, such behavior certainly confirmed Cada's awareness of an adverse employment decision on May 5.[2] The Seventh Circuit, in accordance with the opinions of this Court, carefully considered the evidence presented in this case, and properly concluded that on May 5, 1987 an ad-

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[2] Indeed, in addition to the specific factual findings made by the Seventh Circuit, a review of the following undisputed evidence which Baxter presented to the lower courts under Fed. R. Civ. P. 56 further confirms Becks' authority, and his communication to Cada of the Company's official termination message, on May 5:

(1) After meeting with Cada on May 5, Becks met with Cada's staff that same day and, when they returned, they were upset and told Cada that he had been "shafted" (7th Cir. App. 41-42, 135-37);

(2) At no time did the person Cada claims should have fired him—Jim Stauner—ever inform Cada that he was his direct supervisor, and indeed, Cada had never even met with Stauner as of May 5, 1987 (7th Cir. App. 61, 106, 157);

(3) Cada himself later described the May 5, 1987 conversation with Becks in a written letter as follows:

> In May of '87, I was notified *by my new supervisor* that, since I was approaching 65 in August, *he had made plans to replace me.* My separation was effective at the end of July and I would receive, as *termination* payment, a continuation of my salary through the end of '87, full payment for vacation time accrued, and free outplacement services through a company named "Mainstream." He reasoned that this was a generous offer.

(7th Cir. App. 159, emphasis added; *see also id.* at 144);

(4) Cada dramatically circled the date of his meeting with Becks in his calendar (7th Cir. App. 154); and

(5) Cada admitted that the personnel employee who handed him his severance packet on May 5 said, "I'm sorry" (7th Cir. App. 94).

verse employment decision was made and communicated to Cada, and that his claim was therefore time-barred.[3] Accordingly, because there is no significant legal controversy and Cada's Petition has failed to raise obvious errors in the decisions of the courts below, Cada's Petition should be denied. *See Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275 (1949) (and cases cited therein) (denying a petition for writ of certiorari where the court of appeals affirmed the order of a district court).

CONCLUSION

Based on the foregoing arguments and authorities, Respondent respectfully submits that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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[3] The district court and the Seventh Circuit also recognized the inapplicability of the equitable tolling doctrine to Cada's case. The Seventh Circuit's opinion emphasizes that this doctrine is unhelpful to Cada, in light of the fact that he let eight months lapse from when he saw his younger alleged replacement until he filed his charge. The Court also emphasized that Cada had admitted that he first considered filing a complaint of discrimination "[w]hen [he] started kicking [him]self in the fanny for letting it go so long" (Cada Petition App. A14; *see also* 7th Cir. App. 150-151).